Supreme Court, U.S.
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No. 04-529

IN THE

SUPREME COURT OF THE UNITED STATES

SUPERIOR PROTECTION, INC.,

Petitioner,

v.

N.L.R.B.

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1.

Whether the discharge of a security guard at a federal office for lying under oath in a National Labor Relations Board the ("Board") representation case hearing is a violation of the National Labor Relations Act because the employee was testifying in behalf of the union seeking representation, even though lying to a public official is grounds for discharge under the General Services Administration (GSA) contract with his employer covering his employment.

2.

Whether in any event the discharged security guard is not entitled to reinstatement or back pay under the after-acquired evidence doctrine because, at the time of his discharge, it was discovered that he was in further violation of the (G.S.A.) contract because his gun was dirty and he was carrying in excess of the maximum ammunition, both offenses being serious infractions of GSA contract rules.

STATEMENT OF INTERESTED PARTIES

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit were:

Superior Protection, Inc. - Petitioner
Michael Jay Kuper - Counsel for Petitioner
Raymond L. Kalmans - Counsel for Petitioner
National Labor Relations Board - Respondent
David Seid - Counsel for Respondent
Aileen Armstrong - Counsel for Respondent
Meredith Jason - Counsel for Respondent
Curtis Wells - N.L.R.B. District 16 - Regional Director
James Carney - USGOA Local 1225 President

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is non-published. The citation of the Decision and Order of the National Labor Relations Board is 339 N.L.R.B. No. 118 (2003).

STATEMENT OF JURISDICTION

This Court has jurisdiction over this petition pursuant to 28 U.S.C. § 1254(1) because the petition asks the Court to issue a writ of certiorari to review a case in the United States Court of Appeals for the Fifth Circuit. The Court of Appeals entered its opinion on July 26, 2004. This petition is being filed with the Clerk of this Court within 90 days from the date of the judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 158(a) (1), (3) and (4) Unfair labor practices

a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title....

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not

established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discrimination against an employee because he has filed charges or given testimony under this subchapter;

STATEMENT OF THE CASE

Petitioner Superior Protection, Inc., ("Superior") seeks review of a decision of the United States Court of Appeals for the Fifth Circuit enforcing a decision and order of the Board ordering, among other things, that Superior offer reinstatement and pay back pay to a former employee, Kelvin Trotter, a security guard at a federal office, who was discharged for lying under oath at a Board representation hearing. Lying under oath to a public official is grounds for discharge under the GSA contract covering the guard's employment. When he was discharged, it was discovered that his gun was dirty and that he was carrying in excess of the maximum amount of ammunition allowable, both also grounds for discharge under the GSA contract, and therefore, under the after-acquired evidence doctrine, an additional reason for not enforcing the Board decision and order.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit opinion in this case conflicts with the opinion of this court in *Hoffman Plastic Compounds, Inc.*, 535 U.S. 137 (2002), in which this court reversed a decision of the District of Columbia Circuit Court enforcing a Board decision and order ordering back pay for an illegal immigrant who had obtained his job using fraudulent documents and was discharged for his activities on behalf of a union. This court acknowledged the apparently undisputed illegal employer conduct in violation of the National Labor Relations Act, but refused to enforce the board back pay order, holding

> ...that where the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield. *Id* at p. 7.

This court in *Hoffman* distinguished *ABF Freight System, Inc.* v. *NLRB,* 510 U.S. 317 (1994), wherein, with obvious great reluctance, a Board order was enforced awarding reinstatement and back pay for an employer who, like the employee in this case, lied under oath in a Board hearing, and the Board, as in this case, found that the real reason for the discharge was union animus, and not the false sworn testimony. In *ABF,*[1] as in *Hoffman,*[2] this court stated with emphasis that the ruling in *ABF* was not to be interpreted as a license for the Board to disregard false testimony under oath, and/or fraudulent conduct. Of course, in this case, as in *Hoffman,* the Board really crossed the line in condoning conduct in violation of the rules of the G.S.A., the federal agency responsible for the security and protection of federal workers.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

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[1] "False testimony in a formal proceeding is intolerable. We must neither reward nor condone such a "flagrant affront" to the truth-seeking function of adversary proceedings. *Id* at p. 322.

[2] "This court has consistently set aside the Board's back pay awards to employees found guilty of serious illegal conduct in connection with their employment." *Hoffman,* at p. 137.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 03-60880

NATIONAL LABOR RELATIONS BOARD, Petitioner

verses

SUPERIOR PROTECTION, INC., Respondent

Petition for Enforcement of Order of
The National Labor Relations Board
Nos. 16-CA-21399, 21495 and 10361

Filed July 26, 2004

Before JOLLY, WIENER, and PICKERING, Circuit Judges.

PER CURIAM:*

Petitioner National Labor Relations Board ("NLRB" or "Board") seeks enforcement of its order commanding Respondent Superior Protection, Inc. ("Superior"), its officers, agents, successors and assigns, to cease and desist (1) impliedly threatening employees in writing with discharge or discipline for supporting United Government Security Officers of America and its Local #229 or any other union (collectively, "the Union"), (2) disciplining, discharging or otherwise discriminating against any employee for supporting the Union, (3) disciplining, discharging or otherwise discriminating against employees because they have given testimony under the National Labor Relations Act (the "Act"). The Board also seeks enforcement of its order commanding Superior to reinstate fired employee Kelvin Trotter to his former position, to make him whole for loss of earnings and other benefits pursuant to F.W. Woolworth Co., less any interim earnings and plus interest as computed in New Horizons for the Retarded, to remove from its files any reference to Trotter's discipline and discharge, to make various employment records available to the Regional Director of the NLRB, and to post at its Houston, Texas facility copies of a notice appended to the order. Finally, the Board seeks enforcement of its order instructing the Regional Director of the NLRB to open and count Trotter's contested ballot, serve a revised tally on the parties, and issue the appropriate certificate. Superior resists the enforcement of the orders or any portion or portions thereof.

We have carefully considered the briefs of counsel for the parties and the record of this case as supplemented, including the extensive, highly detailed analysis of the Administrative Law Judge ("ALJ") of August 28, 2002, as modified September 25, 2002. As a result, we conclude, under the applicable "substantial evidence" standard of review, that the NLRB's order is reasonable, supported by such evidence, and must ben enforced in full.

As the parties are fully conversant and familiar with their respective burdens of proof and persuasion and with the standards applicable to our review of cases under § 8(a)(3) and (4) of the Act, we need not reiterate those standards here. If suffices that when the Board charges an employer with unfair labor practices under these subsections–discharging or otherwise discriminating against an employee because he has given testimony under the Act or discriminating by terminating employment to discourage membership in a labor organization–the general counsel's burden of persuasion is to demonstrate what protected activity of an employee, if any, was a substantial motivating factor in an adverse employment action taken by the employer against the employee. If that burden is met, it becomes incumbent on the employer to demonstrate that (1) it took the action complained of on the basis of unprotected conduct, and (2) it would have taken the same action in the absence of protected conduct. An employer's proffered non-discriminatory reason and a determination that the adverse employment action would have been taken even in the absence of protected activity are nevertheless trumped by a demonstration of pretext. The overarching principle is that reasonable decision of the NLRB must be affirmed if it is supported by substantial evidence, even if we might have reached a contrary conclusion. This is particularly true in cases, such as this, when the decision of the NLRB is grounded in large part on credibility determinations of the ALJ who, after all, heard the testimony and observed the demeanor o the witnesses for the opposing parties – here including none other than the employer's President, Jack Heard, and the eventually terminated employee, Kelvin Trotter.

The purportedly non-discriminatory reasons advanced by Superior for the escalating series of adverse employment actions it took against Trotter, culminating with his firing, are (1) lying under oath during the initial hearing conducted by the ALJ and in subsequent federal and state utterances, (2) disobeying a direct command by a superior (here, Heard, the

employer's President) to report for work "on-time" immediately following Trotter's testimony at the initial hearing, (3) insubordination in a confrontation with a supervisor, Jose Castillo, and (4) possessing a "dirty" firearm and a total number of cartridges in excess of the maximum allowed. The ALJ concluded, and the NLRB agreed, based on widely divergent positions and explanations advanced by the parties, that the reasons given by Superior were pretextual, that the disciplinary actions taken against Trotter were grounded in anti-union animus, and that the adverse employment actions in question would not have been taken but for that animus. As we agree, we touch only briefly on Superior's proffered non-discriminatory reasons for its actions.

First, Superior's allegations that Trotter lied address almost entirely statements he made at NLRB hearings and to the State Unemployment authorities regarding his transfer by Superior from Galveston to Houston well before commencement of the organizing efforts here at issue. Other than that, the allegations of mendacity address Trotter's reason for requesting time off on the morning of the initial hearing. He told his immediate supervisor that he needed to attend to a personal matter when, in fact, he was responding to the subpoena for the initial hearing before the ALJ.

Superior's claim that Trotter lied about not having applied for a transfer boils down to a quibble over whether he "applied" on several occasions to be transferred from Galveston to Houston or merely informally "requested," or let his preference be known, that he would like to be transferred to Houston. Not only was the issue whether he had applied for a transfer wholly irrelevant to the purpose of the hearing and Trotter's testimony, Superior's strident efforts to classify Trotter's response as lies under oath fail. As the ALJ and Board observed, the question could easily have been understood by Trotter as going to the matter of a formal, written application for transfer (which he never did)

rather than to informal, oral requests that he be considered for transfer.

As for the reason given by Trotter for requesting a few hours of time off work on the morning of the hearing, there was at least substantial evidence that "personal business" or "personal matters" were explanations frequently given by Trotter and other Superior employees to – and deemed sufficient by – immediate supervisors. Nothing indicates the necessity for an employee, even a court security officer, to go into great detail about the reasons for wanting a few hours off, particularly when, as here, going into greater detail would risk adverse reaction to otherwise protected activity.

Then there is the "charge" that Trotter disobeyed Heard's direct order to report on time, which is particularly revealing of Superior's animus. Even though Trotter's immediate superior, Office Johnson, confirmed that the only thing he had told Trotter about reporting to work after time off on the morning of the initial hearing was that Trotter needed to report sufficiently ahead of his (Johnson's) 4:00 p.m. court date, Superior has endeavored to manufacture a reporting time of noon and then to make much over the time elapsed between Trotter's departure from the initial hearing to change into uniform and report for duty, which he did by approximately 1:30 p.m. What came through loud and clear to the ALJ – then subsequently to the NLRB, and now to us – is that Trotter's surprise appearance and pro-union testimony at the initial hearing touched off an immediate reaction by Heard to squelch Trotter's anti-union activities and (likely) terminate his employment. By telephone, Heard immediately set off a flurry of activity following the adjournment of the hearing and well before Trotter could possibly have made it back to his duty station, even if he had not gone home to change into his uniform. By the time Trotter reported, the Heard-initiated action had traveled directly down the chain of command so that, when Trotter

arrived, Johnson refereed him to Castillo, where the provocation discussed below commenced. We agree with the ALJ and the NLRB that Heard's admonition to Trotter as he left the meeting not to be late for work – even if not the tension-breaking jest that Trotter perceived it to be – cannot be elevated to the level of a direct order of a remote superior to be at his duty station by 12:00 noon.

We also conclude that there is substantial evidence that the confrontation between Trotter and Castillo following Trotter's reporting to work, which encounter admittedly escalated to "heated," was orchestrated from higher up, intentionally provoked by Castillo, and eventually used by Superior as a pretext to mask its anti-union animus in taking the adverse employment actions against Trotter. Castillo twice made Trotter cool his heels for protracted periods while waiting to be seen. The ALJ determined, based in large part on credibility calls, that Castillo deliberately goaded Trotter to the point of heated words and profanity, after intentionally irritating him by making him wait; and that this was deliberate incitement. We cannot say that the credibility calls, factual testimony, and reasonable inferences drawn from substantial evidence do not support this conclusion of the ALJ and the NLRB under the applicable standard of review.

The proffered weapons charge, i.e., that Trotter's sidearm was "dirty" when, on Castillo's order, he turned it over, and that he was in possession of an excess number of rounds for that weapon, is neither consistent with nor violative of the provision of the contract between Superior and the General Services Administration ("GSA") that Superior cites in support of its rule-violation charge against Trotter. Even assuming that the cleanliness of the handgun was not up to the expected level of "spit and polish," such a first-time infraction would fall into the category of the most minor of offenses, at most justifying an admonition to clean it and keep it clean.

Turning to the question of the number of cartridges that Trotter possessed, the applicable provision of the GSA contract or Guard Manual cited by Superior states:

> Each guard, entering on duty, including the uniform onsite shift supervisor(s) shall be issued twelve (12) rounds of 125 grain hollow point ammunition. Six (6) rounds shall be used as a firearm load with six (6) rounds carried in a cartridge case.

This is the sole basis of Superior's claim that Trotter's possession of an excess six cartridges – 18 rather than 12 – put Superior in violation of its contract with the GSA. We agree with the ALJ and the Board that, under no recognized method of contractual interpretation can this language be construed to impose a limit on the maximum number of cartridges that a guard my possess while on duty. To the contrary, the plain wording of the provision is best construed as a minimum ammunition requirement. Regardless of the best interpretation, however, what the insupportable charge against Trotter demonstrates beyond cavil is that Superior was grasping at straws to manufacture charges against Trotter as pretexts for the real basis of his termination – his pro-union activity and Superior's anti-union animus, which stated at the top with Heard and promptly proceeded all the way down the chain of command. This is the conclusion of the NLRB based on the findings of the ALJ; and we cannot say that this conclusion is unreasonable or lacking in support from substantial evidence.

In conclusion, for essentially the same reasons as set forth in the writings of the ALJ and the NLRB, we grant the Board's application for enforcement of the Order filed October 23, 2003, and we order same enforced in full.

ENFORCEMENT ORDERED.

Superior Protection, Inc. *and* United Government Security Officers of America, for and on behalf of Local 229[1]. Cases 16–CA–21399, 16–CA–21495, and 16–RC–10361
July 31, 2003

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND ACOSTA

On August 28, 2002, Administrative Law Judge Robert A. Pulcini issued the attached decision and on September 25, 2002, an erratum to that decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief. The Respondent filed a reply brief. The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board has considered the decision and the record in light of the exceptions and briefs[2], affirms the judge's

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[1]In a limited exception, the Charging Party moves the Board to amend its name in the caption. We grant the exception and amend the name as requested.

[2]The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties. We also deny the Respondent's motion to reopen the case and receive further evidence. Member Acosta joins his colleagues in denying the Repsondent's exception to the judge's ruling rejecting its attempt to introduce into evidence the entire transcript, correspondence, and pleadings from the preelection hearing in the representation case, rather than just the portion of the transcript containing the

rulings, findings[3], and conclusions[4], and adopts the

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testimony of discriminatee Kelvin Trotter, whose testimony in the present proceeding the Respondent seeks to discredit. In the absence of newly discovered or previously unavailable evidence or special circumstances, a respondent is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. *Transportation Maintenance Services*, 331 NLRB 1050 (2000). Member Acosta finds that the Respondent has failed to explain how the admission of the remaining transcript is appropriate or necessary because, as the judge stated at fn. 2 of his decision, the judge admitted Trotter's previous testimony into evidence, and the remaining key witnesses to matters in issue here—specifically Trotter's alleged status as a discriminatee discharged in violation of Sec. 8(a)(3)—appeared and testified subject to cross examination in the present proceeding.

[3]The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. Some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[4] In adopting the judge's findings, we find it unnecessary to draw an adverse inference from the Respondent's failure to call employees King and Murphy. Even absent the adverse inference, the judge's findings and conclusions are well-founded in the record. In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) and

recommended Order as modified[5].

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(1) when it imposed a 3-day suspension and 90-day probationary period on Trotter, we reject the Respondent's characterization that Trotter was "loud, belligerent, insubordinate, disrespectful, and profane" when Contract Administrator Jose Castillo confronted him. Castillo used this characterization to describe Trotter's actions, but the judge did not credit this testimony. We agree with the judge that the asserted basis for the Respondent's decision to issue the initial 1-day suspension to Trotter was pretextual and that the Respondent could not in the circumstances of this case rely on conduct it provoked as a basis for disciplining Trotter. We adopt the judge's conclusion that the Respondent's stated reason for Trotter's discharge, which was that he "lied" at the Board hearing, was also pretextual. In doing so, however, we do not rely upon the judge's statement that the Board "*construes testimony* before it 'liberally.'" (Emphasis added.) Rather, we note that the Board interprets Sec. 8(a)(4), and not witness testimony, liberally: "[I]t is clear that *Section 8(a)(4) is to be construed liberally* . . . and that it protects even false testimony so long as such testimony was not willingly and knowingly false and uttered with intent to deceive." *Glover Bottled Gas Co.*, 275 NLRB 658, 673 (1985) (emphasis added)

[5]We modify the recommended Order to include a remedial provision for the Respondent's violation of Sec. 8(a)(4). Also, the judge included in his recommended remedy a provision requiring the Respondent to reimburse Kelvin Trotter for any extra Federal or State income tax that would result from the lump sum payment of any backpay award. Granting this request would involve a change in Board law. See, e.g., *Hendrickson Bros.*, 272 NLRB 438, 440 (1985), enfd. 762 F.2d 990 (2d Cir. 1985). In light of this, we believe that the appropriateness of this proposed remedy should be resolved after a full briefing by the affected parties. See *Kloepfers Floor Covering, Inc.*, 330 NLRB 811 fn. 1 (2000).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Superior Protection, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b) and reletter the subsequent paragraph accordingly.

"(b) Disciplining, discharging, or otherwise discriminating against any employee for supporting United Government Security Officers of America and its Local #229 or any other union.

"(c) Disciplining, discharging, or otherwise discriminating against employees because they have given testimony under the Act."

2. Substitute the following for paragraph 2(b). "(b) Make Kelvin Trotter whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), less any interim earnings, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987)."

3. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the Regional Director for Region 16 shall, within 14 days from the date of this Order, open and count the ballot of Kelvin Trotter, and shall prepare and serve on the parties a revised tally of ballots, and issue the appropriate certification.

Because there has been no such briefing in this case, we decline to include this additional relief in the Order here.